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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

NGHIA NGUYEN,

Defendant and Appellant.

G052449

(Super. Ct. No. 14HF3719)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, John Conley and Dan McNerney, Judges. Affirmed.

Susan S. Bauguess, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

* * *

A jury convicted Nghia Nguyen of first degree residential burglary (Pen. Code, §§ 459, 460, subd. (a) [count 1]; all statutory citations are to the Penal Code unless noted), unlawful taking or driving a vehicle (Veh. Code, § 10851, subd. (a) [count 2]), possession of tear gas by a prohibited person (§ 22810, subd. (a) [count 3]; see § 17240, subd. (a)), and misdemeanor possession of burglary tools (§ 466 [count 4]). The trial court imposed a prison sentence of four years.

Nguyen appealed, and his appointed counsel filed a brief under the procedures outlined in *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*). Counsel summarized the facts and procedural history of the case, but raised no specific issues, and asked this court to review the record to determine whether there were any arguable matters. Counsel did not argue against her client or offer an opinion on the merits of the appeal. After reviewing the record, counsel advised Nguyen she would file a *Wende* brief, and provided him with a copy of the brief. She also advised Nguyen he could personally file a supplemental brief on his own behalf raising any issues he believed worthy of consideration, and she sent him a copy of the appellate record. She informed Nguyen he could ask the court to relieve her as counsel. We gave Nguyen 30 days to file a supplemental brief. Nguyen has not requested to have appellate counsel relieved, but has filed a supplemental brief. We have reviewed the record and Nguyen's supplemental brief, and found no arguable issues. We therefore affirm the judgment.

FACTS AND PROCEDURAL HISTORY

In January 2015, the Orange County District Attorney filed an information alleging Nguyen committed first degree residential burglary, unlawful vehicle taking or driving, misdemeanor possession of tear gas, and misdemeanor possession of burglary tools. It further alleged Nguyen committed the burglary offense while released on bail (§ 12022.1, subd. (b)) in O.C. case No. 14CF3995.

At Nguyen's trial, William Cox testified he and his wife returned to their Newport Beach residence around noon on December 28, 2014, after a four-day vacation. The couple noticed fresh pry marks on their front door, and tools, including a pry bar and power drill, near the door. After they entered their home, Nguyen came walking toward them down the hall. Angry shouting ensued, and Nguyen claimed "he had taken over the house because" of a government lien. Nguyen pointed to a purported foreclosure notice posted on the front door. Cox's home was not in foreclosure and the document referenced another unit in the condominium complex. Cox pointed this out to Nguyen, but Nguyen claimed he and his partner "own the whole place [entire complex]."

Cox phoned the police, and an officer arrived five minutes later. An investigation revealed the thief or thieves cleaned out a master bedroom safe of perhaps \$50,000 in jewelry and approximately \$5,000 in cash. The thief also took another \$1,000 from a sock drawer, and rifled through papers in the den. Cox's wife reported the thief stole her husband's coin collection and travelers checks, although police officers later returned some travelers checks to her.

Officer Sam Sa searched Nguyen at the scene and found \$300 in traveler's checks in his right pants pocket. Nguyen told Officer Sa he was in the foreclosure business with Bill Martin, he had foreclosed on the home, hired a locksmith to gain entry, and now resided at the home. Nguyen directed Sa to a black bag for additional paperwork, but Sa noticed nothing in the papers he found that corroborated Nguyen's claims. Nguyen revealed the jewelry was in his vehicle, but did not explain where the cash could be located.

Sa searched Nguyen and found the key to the Coxes's other car, a Lexus SUV, which remained parked inside the garage. Officers found six empty marijuana containers in the rear cargo area of the Lexus. Nguyen claimed they belonged to him, and admitted he had driven the Coxes' Lexus several times in the previous few days. Officers found a can of Smith and Wesson pepper spray in the driver's side door of

Nguyen's Acura. At trial the parties stipulated Nguyen was a person prohibited by statute from possessing pepper spray (§ 22810, subd. (a)).

Nguyen testified he learned about the property at the Santa Ana courthouse from someone named "Mike." He researched the property on the Internet, and then gave Mike \$8,000 in cash for the property after an auction in early November. Nguyen asserted Mike told him a \$1 million lien remained on the property. Nguyen had purchased other properties cheaply on eBay so did not think the price was too low even though he recognized the home was near the beach in a wealthy area.

Nguyen claimed Mike gave him the papers to the property and he decided to move in. In late December he found a locksmith on Craigslist and gave him \$100 in cash to open the door, and a \$300 check to change the locks. He showed the locksmith his identification and the court documents. He entered the house freely over the next three days before the Coxes returned home.

Nguyen thought the residents might have passed away because "all their stuff was there." Several of his friends, including "Pineapple," Pineapple's neighbor, and "Rashad" joined him at the residence and helped Nguyen gather up the clothes in the residence and put them in the garage. Nguyen thought the owners' daughters might retrieve the property. Pineapple kicked in the door after Nguyen told him he paid for a locksmith. Nguyen became angry and told Pineapple to fix the door. The tools by the door belonged to Pineapple.

Nguyen unlocked the safe with a key he found in a box. He took the cash and deposited it into a bank account belonging to Bill Martin, although he had not yet told Martin about the deposit. He photographed the jewelry, put it in a bag, and placed it in Pineapple's car. He thought Pineapple put the jewelry in a safe at Pineapple's house. Nguyen admitted he did not tell Officer Sa where to find the jewelry. Although Nguyen thought his purchase of the house at an auction entitled him to own everything in the house, he nonetheless wanted to keep the cash and jewelry in a "safe spot."

Nguyen greeted the Coxes, told them he bought the property at a court auction, and hoped to resolve issues concerning the personal property. He denied saying he owned the whole complex. He told the officer he obtained the home at an auction, but the officer looked at his paper and said it was “fake” because it contained Chinese writing. He told the officer about his black bag, which contained paperwork concerning other auctions and properties he had purchased.

William Martin testified he was a used car salesman who sold Nguyen a car 12 years earlier. Nguyen, using the business name Green Car, also bought from him, or went into escrow on, a five-acre piece of recreational property in Lucerne Valley. Nguyen made a \$1,000 deposit for the property and was required to pay off the remaining balance on January 1. He told Martin he was going to Las Vegas to cash in poker chips he bought online. Martin saw the chips, some of which were for \$10,000, and advised Nguyen to be careful because “those guys play real rough.” Nguyen later called and told him the chips were “no good.” Nguyen deposited \$10,000 into Martin’s account around Christmas 2014. Martin assumed it was for the property. He did not know where the money came from and did not ask any questions.

The jury convicted Nguyen of the charged offenses. The prosecutor requested, and the court granted, dismissal of the “crime-bail-crime allegation.” In August 2015, the court imposed a four-year prison term comprised of the four-year midterm for first degree burglary, and a concurrent two-year term for vehicle taking. The court suspended sentence for the misdemeanors.

DISCUSSION

Following *Wende* guidelines, we have reviewed appellate counsel’s brief and the appellate record. We have considered counsel’s suggestion we review whether the trial court abused its discretion when it denied Nguyen’s *Marsden* (*People v. Marsden* (1970) 2 Cal.3d 118) motions, and whether there is substantial evidence Nguyen had the specific intent required for burglary and unlawful vehicle taking.

Nguyen personally filed a supplemental brief (*People v. Kelly* (2006) 40 Cal.4th 106, 111 [appellate court must address issues raised personally by appellant in a *Wende* proceeding]). He asserts he did not want to go to trial without having the testimony of the locksmith he hired to change the locks. His attorney did not locate the \$300 check he wrote to the locksmith, a carbon copy of which should have been in property held by the Newport Beach Police Department, nor did counsel find other evidence to support his claim the locksmith “got the wrong address not [Nguyen].”

He told officers he put money in Martin’s bank account, and his friend had another bag for safekeeping because he could not lock the door. Nguyen appears to complain the officers did not record a copy of his statements or have him write them down, and counsel did not uncover these recorded statements.

Nguyen complains he twice told the trial judge he wanted a new attorney because counsel “wasn’t doing anything [he] asked him to,” including finding the locksmith, bringing his papers in evidence at trial, contacting “people on the court document,” and letting him know “what[’]s going on.” He asserts he did not know trial was commencing on the day it began, he “wasn’t even ready,” and trial went forward with “none of [his] evidence.” He told his lawyer he wanted the “original papers” rather than photographs of “one [piece] from a stack” and says “even the [victims] could hardly read the picture in evidence.” He says documents in his possession showed he bought other homes online in other auctions.

He says he was “tricked” into signing a paper reflecting he had a prior felony conviction (case No. 07WF1926) that he later found out qualified for reduction under Proposition 47.

He complains his attorney lied “to everyone say[ing he was] crazy and [his] documents are fake.” Nguyen appears to fault trial counsel for wasting time by sending “a shrink” to test him, noting the doctor concluded he was fine. He says he did not get

“discovery from” his trial attorney “even tho [he] asked for it four times.” He felt his attorney was against him.

A criminal defendant is constitutionally entitled to the assistance of court-appointed counsel if he is unable to employ private counsel. (*Marsden, supra*, 2 Cal.3d at p. 123.) The decision whether to permit a defendant to discharge his appointed counsel and substitute another attorney during the trial is within the discretion of the trial court. (*Ibid.*) The trial court must replace counsel where the first appointed counsel is not adequately representing the accused. (*Ibid.*) The trial court must listen to the defendant’s reasons for requesting a change of attorneys. (*Ibid.*) Factors the court should consider include whether the defendant has a defense that is not being presented, whether trial counsel consulted sufficiently with the accused and adequately investigated the facts and the law, and whether the omissions charged to trial counsel result from inadequate preparation or unwise choice of trial tactics and strategy. (*Id.* at pp. 123-124.)

To obtain reversal on appeal based on ineffective assistance of counsel, a convicted defendant must show “counsel’s representation fell below an objective standard of reasonableness” (*Strickland v. Washington* (1984) 466 U.S. 668, 688), and that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” (*Id.* at p. 694.) Judicial scrutiny of counsel’s performance is highly deferential. “[A] court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action ‘might be considered sound trial strategy.’” (*Id.* at p. 689.) “[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel’s challenged conduct on the facts of the particular case, viewed as of the time of counsel’s conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been

the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.” (*Id.* at p. 690.)

We have reviewed the record, including the transcripts of the *Marsden* hearings. Nothing in the record suggests the trial court failed to listen to Nguyen’s concerns or abused its discretion in assessing trial counsel’s performance and denying Nguyen’s requests for new counsel. Nor did the court err in rejecting Nguyen’s claim trial counsel did not confer with him “as often as necessary . . . to elicit matters of defense. . . .” (*People v. Pope* (1979) 23 Cal.3d 412, 425.)

Nguyen has not shown counsel’s representation fell below an objective standard of reasonableness, or the result of the trial would have been different had counsel performed as Nguyen asserts he should have. The record does not reflect counsel failed to investigate whether Nguyen hired a locksmith to unlock the Cox’s home, including trying to find a check to the locksmith Nguyen may have written or a receipt. Counsel stated he reviewed Nguyen’s bank account records, and did not find a check going to a locksmith. He also reviewed papers seized by the police and found no carbon copies of checks. He attempted to contact Nguyen’s girlfriend to see if she had a copy of the check. And although Nguyen complains he was not ready for trial, he refused to waive time so his lawyer could conduct additional investigation.

The record does not support Nguyen’s claim his lawyer did not reasonably investigate whether additional evidence existed to show Nguyen believed he lawfully acquired the Coxes’ or a neighbor’s residence, and did not intend to steal their personal property. Counsel stated he reviewed Nguyen’s paperwork, which referred to two other properties. Counsel found no mention of the 30 properties claimed by Nguyen in the evidence that had been booked in the case. Nothing suggests counsel acted unreasonably in presenting Nguyen’s documentation of his real estate ventures. The record reflects counsel did present evidence that Nguyen had a business venture and an agreement or

evidence of purchase of other properties from eBay. Counsel's decision to present originals or copies of documents, and what documents to present, were clearly within the tactical purview of trial counsel.

Concerning any postarrest statements by Nguyen potentially corroborating his trial testimony, nothing suggests police officers or the prosecution failed to turn over any evidence of such statements. Nor does anything suggest trial counsel failed to investigate this issue and present whatever evidence counsel believed assisted Nguyen's case.

As for Nguyen's claim he was tricked into agreeing he had a prior conviction, the record reflects the attorneys did examine the *Tahl* (*In re Tahl* (1969) 1 Cal.3d 122, 129) guilty plea form from a prior case and the factual basis provided Nguyen entered a commercial business with the intent to pass a fraudulent credit card to commit larceny. There was no evidence a court had reduced this conviction to a misdemeanor under Proposition 47. (See § 1170.18.) Accordingly, nothing suggests the trial court erred in allowing Nguyen to be impeached with having suffered a felony for dishonest conduct. (See also *People v. Wheeler* (1992) 4 Cal.4th 284, 288 [trial court has discretion to admit acts of dishonesty or moral turpitude relevant to impeachment].)

Finally, nothing supports Nguyen's complaint his trial lawyer was "against" him. Counsel did have a psychiatrist speak with Nguyen, even though Nguyen thought this was "wasting time" and did not have anything to do with the case. Counsel elected to paint Nguyen as a person who did not have "a great grip with what's going on," had a "different sense of reality," and "thought in his mind that he was taking over" the Coxes' property. Counsel focused on the element of specific intent, and argued Nguyen "didn't have [that] intent" because he "thought these things [were] real," but he was factually mistaken. Nothing suggests counsel acted unreasonably in light of the evidence in the record.

We discern no arguable appellate issue exists. We will therefore affirm the judgment. (*Wende, supra*, 25 Cal.3d at p. 443.)

DISPOSITION

The judgment is affirmed.

ARONSON, ACTING P. J.

WE CONCUR:

FYBEL, J.

IKOLA, J.